(12)

HIGH COURT OF CHHATTISGARH : BILASPUR

Criminal Appeal No. 688 of 2001

Smt. Nayoti

Versus

State of Chhattisgarh

JUDGMENT FOR CONSIDERATION

Sd/-
L.C.BHADOO
Judge
25-10-2007

HON'BLE MR. JUSTICE SUNIL KUMAR SINHA

Sd/-
SUNIL KUMAR SINHA
Judge
25-10-2007

POST FOR JUDGMENT ON 26th OCTOBER, 2007

Sd/-
L.C.BHADOO
Judge
Date--10-2007

(13)

HIGH COURT OF CHHATTISGARH : BILASPUR

Division Bench : **Hon'ble Shri L.C. Bhadoo &**
Hon'ble Shri Sunil Kumar Sinha, JJ

Criminal Appeal No. 688 of 2001

Appellant : Smt. Nayoti, W/o Sukhram Kanwar, aged 35 years, R/o Village Keshgawan, Police Station Lakhanpur, District Sarguja (CG).

Versus

Respondent : State of Chhattisgarh, Through In-Charge Police Station Lakhanpur, District Sarguja (CG).

(Criminal Appeal under Section 374(2) of the Cr.P.C.)

Present :- Shri Vijay Deshmukh, counsel for the appellant.
Shri Sudhir Bajpai, Dy. Govt. Advocate for the State.

JUDGMENT
(Delivered on 26th October, 2007)

The following judgment of the Court was delivered by ***L.C. Bhadoo, J***

1. By this appeal under Section 374 (2) of the Cr.P.C. the accused/ appellant namely, Smt. Nayoti Bai, has questioned the legality and correctness of the judgment of conviction and order of sentence dated 24-7-2001 passed by the Sessions Judge, Sarguja, in Sessions Trial No.92/2001 whereby and whereunder learned Sessions Judge after holding the accused/appellant guilty for commission of offence under Section 302 of the IPC sentenced her to undergo imprisonment for life.

2. Case of the prosecution, in brief, is that Kikoo (since deceased), aged about six years, was the son of brother-in-law & sister-in-law i.e. Devar & Devrani of the accused. The children of the accused were not surviving as they used to die just after giving birth by the accused, therefore, she was having grudge against Kikoo, son of her brother-in-law & sister-in-law. When in the morning of 31-12-2000 Kikoo was playing with one Kamte near the sugarcane field, at that time accused called Kamte & Kikoo saying that she will give them *Murradana* and when Kamte & Kikoo went near the accused & demanded *Murradana*, the accused attacked the deceased with a spade (*Kowdi*) on the head

(14)

of Kikoo, as a result of which he died spontaneously. The matter was reported by Madan Gopal Singh in out post Udaipur vide crime No.0/2000 and the same was forwarded to Police Station Lakhanpur, which was registered as crime No.1/2001. Based on that Police Station Lakhanpur registered the First Information Report (Ex.P/12). Merg intimation Ex.P/13 was given by Ram Prasad. Based on the merg intimation, after giving notice Ex.P/5 to the Panchas, the Investigating Officer prepared inquest on the body of Kikoo under Ex.P/6. Blood stained & plain soil was taken into possession from the place of occurrence under Ex.P/7. Accused gave memorandum under Ex.P/8 regarding the place where the weapon of offence was kept and in pursuance of that, the spade was seized under Ex.P/9 at the instance of the accused. Site plan (Ex.P/10) was prepared by the Investigating Officer. The body of Kikoo was sent for postmortem examination to the Community Health Centre, Uadipur under Ex.P/11 where Dr. Ashutosh Tiwari (PW-9) conducted postmortem on the body of deceased. He opined that mode of death was shock due to excessive hemorrhage from injuries. Death was homicidal in nature. Postmortem report is Ex.P/17. As per the postmortem report, following injuries were fund on the body of deceased.

- Perforated fracture on the left parietal region in the mastoid process in the size of 7 cm. x 1 cm. up to brain tissue. Brain material coming out from skull wound.
- Perforated fracture present on occipital bone left side in the size of 5 x 1 cm. vertical in direction. It is 3 cm. away from injury No.1. Brain material coming out from the wound.
- Perforated fracture on occipital bone left side in the size of 4 cm. x 1 cm. oblique in direction.
- All the injuries were ante mortem in nature.

The weapon of offence i.e. spade was sent to the Assistant Surgeon, Community Health Centre, Udaipur under Ex.P/14. After examination of the same, Doctor prepared report under Ex.P/18 and opined that the injuries found on the body of deceased could be caused by the weapon in question.

3. After completion of investigation, charge sheet was filed in the Court of Chief Judicial Magistrate, Ambikapur, who in turn committed the case to the Court of Sessions Judge, Sarguja, where the prosecution examined 9 witnesses in order to establish the charge against the

accused. Statement of the accused was recorded under Section 313 of the Code of Criminal Procedure in which she denied the material appearing against her in the prosecution evidence. She stated that she is innocent and has been falsely implicated in the crime.

4. Learned Sessions Judge after hearing learned counsel for the respective parties, convicted and sentenced the accused/appellant as aforementioned.

5. We have heard Shri Vijay Deshmukh, learned counsel for the appellant and Shri Sudhir Bajpai, learned Dy. Govt. Advocate for the State.

6. At the outset, Shri Deshmukh, learned counsel for the appellant, has not disputed the homicidal death of Kikoo. Moreover, PW-2 Kamte, who was playing with the deceased Kikoo has categorically stated that accused attacked the deceased with a spade. The above ocular evidence is corroborated by the medical evidence of PW-9 Dr. Ashutosh Tiwari, who has stated that there were three perforated fracture injuries on the left parietal region & occipital region. All the injuries were ante mortem in nature. There was a fracture at the places of injury and cause of death was shock, as a result of hemorrhage. Postmortem report is Ex.P/17. Therefore, in view of the above, death of Kikoo was homicidal in nature.

7. As far as the complicity of the accused in the crime in question is concerned, in this case the conviction rests primarily on the testimony of PW-2 Kamte, who is a child witness.

8. Learned counsel for the appellant argued that PW-2 Kamte being a 7 years old child, it was not possible for him to narrate the story as has been stated in his evidence. He is tutored witness and without any corroboration, no explicit reliance can be placed on the evidence of this witness.

9. Section 118 of the Evidence Act envisages that "all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

10. The Apex Court in the matter of **Arbind Singh vs. State of Bihar**[1] held that "child witness is prone to tutoring and hence court should look for corroboration particularly when the evidence betrays traces of tutoring. The facts of that case were that PW-2 Poonam Kumari, who was the daughter of the deceased and appellant was the child witness and the Court after scrutinizing the evidence reached to the conclusion that there were improvements in the statements of child witness, as in her first statement she did not say that her mother was hanged. Subsequently, she said that her mother was hanged by electric wire, she later said that she was hanged with the help of a jute string and in her statement recorded under Section 164 of Cr.P.C. she stated that her father had thrown a jute string around the neck of her mother and killed her. Therefore, the Court reached to the conclusion that the child witness was not consistent in her version and there was tutoring on certain aspects. Therefore, the Court said that implicit faith and reliance cannot be placed on her testimony since it was not corroborated by any independent and reliable witness."

11. The Apex Court in the matter of **Panchhi and others vs. State of U.P.**[2] held that "it cannot be said that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell them and thus a child witness is an easy prey to tutoring."

12. The Apex Court in the matter of **Suryanarayana vs. State of Karnkataka**[3] held that "evidence of a child cannot be rejected *per se*, but the court as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of statements and its reliability, base conviction by accepting the statements of the child witness. The evidence of child cannot be discarded only on the ground of her/his being teen age. The evidence of a child witness would require the court to scrutinize the evidence with care and caution. When the witness is shown to have stood the test of cross-examination and there is no infirmity in the evidence, the prosecution can rightly claim a conviction based upon the said

---

[1] 1995 Supp. (4) SCC 416
[2] AIR 1998 SC 2726
[3] 2001 (1) Crimes 1999 (SC)

testimony alone. Corroboration of testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony."

13. The Apex Court in the matter of **Ratan Singh Dalsukhbhai Nayak vs. State of Gujrat**[4] held that "the evidence of a child witness is permissible if such witness is found competent to testify and the court after careful scrutiny of its evidence is convinced about the quality and reliability of the same, where the witness described the detail scenario implicating the appellant, conviction can be based placing reliance thereupon. It was further held that the evidence of a child is not required to be rejected *per se*, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability, can record conviction, based thereon and the trial Judge is required to take a decision as to whether the child witness has sufficient intelligence to understand the questions and in order to decide the intelligence the court may resort to any examination which will tend to disclose his capacity an intelligence as well as his understanding of the obligation of an oath."

14. Therefore, it is settled law that before placing reliance on evidence of a child witness the court is required to satisfy with the following requirements (i) before examining the child witness the Court must put questions in order to ascertain that the child witness is competent to testify and understand the questions put to him/her and not prevented from giving rational answers on account of tender age, (ii) oath should be administered to the child witness only after ascertaining by putting questions that the child witness understands the sanctity of the oath, (iii) before placing reliance on the evidence of a child witness the evidence must be scrutinized carefully and it should be ascertained that the child witness is intelligent enough to understand the questions, there is no likelihood of tutoring or influencing by any one and if the court is convinced about the quality and reliability of a child witness then and then only the court can base conviction on such evidence without corroboration. In other cases it is safe to seek corroboration of the evidence of a child witness.

---

[4] 2004 SCC (Cri.) 7

(18)

15. Applying the above principle, if we scrutinize the evidence of PW-2 Kamte, aged about 7 years, his evidence has been recorded in question & answer form. He has stated that he is not literate and on further question, he stated that he has come to the Court by bus for telling about the death of Kikoo, who was murdered. He replied that in the Court one should tell the truth. After satisfying from the questions and answers, learned Sessions Judge reached to the conclusion that the witness was able to understand the questions and was also able to give answer after understanding the questions. But looking to the tender age of the witness oath was not administered to him. He along with Kikoo went for chewing sugarcane. When they were there the accused came there and attacked Kikoo with a spade, as a result which he sustained two injuries and blood started oozing out from the head-injury. Seeing this he ran away and he did not disclose about the incident to anybody. On cross-examination, he stated that accused is his aunt. Deceased Kikoo was studying in school, but on the fateful day, he had not gone to the school. He further stated that at the time of incident, he along with Kikoo and the accused were there and nobody else was there.

16. Learned counsel for the appellant argued that this witness (PW-2 Kamte) has stated that he did not disclose this fact to anybody, even in his house and he is not able to disclose the name of the husband of the accused. Only on the basis of the fact that Kamte did not disclose about the incident to anybody and he was not able to tell the name of husband of the accused, solely on these two counts the whole evidence of this witness cannot be disbelieved.

17. Perusal of the evidence of PW-2 Kamte clearly establishes that this witness along with the deceased namely, Kikoo had gone to the field of sugarcane for chewing the sugarcane. There accused came and attacked the deceased with spade. He has categorically stated the manner in which the offence was committed. He has answered all the questions in all clarity. Even though in the first place he said that the incident took place in the night, but later, on the next question he said that time of the incident was day. Even the question was put to him as to face of the accused was covered, but he replied that the face of the accused was not covered and he witnessed the accused while attacking Kikoo, therefore, presence of this witness cannot be doubted. In cross-examination, nothing has been brought on record,

(19)

which is suggestive of the fact that this witness was subject to tutoring and he was not speaking the truth. Even the evidence of this witness regarding presence of the accused at the place of occurrence is established by the evidence of PW-3 Amandas, who has stated that on the fateful day Kamte (PW-2) the boy came weeping, said that Kikoo had died & ran away while weeping. At that time, he saw the accused was going from that side. He went to the place of incident and saw that the body of Kikoo was lying and blood was oozing. Even though this witness has been declared hostile, but in cross-examination, he has categorically stated that he saw the accused running away from the place of occurrence. Therefore, the presence of accused is established by the evidence of PW-3 Amandas that at the time of incident the accused was seen running away from the place of occurrence. Other material witnesses have turned hostile. Even PW-5 Bhalai Singh has been produced to prove that the accused made extra judicial confession before him, but he has turned hostile. Therefore, from the evidence of PW-2 Kamte, who was accompanying the deceased at the time of incident. It is established that the accused had attacked the deceased with spade and regarding presence of the accused at the time of incident the evidence of PW-2 Kamte is corroborated by the evidence of PW-3 Amandas. The accused is close relative of the deceased and there is no reason for false implication. On the contrary, as per the evidence of PW-5 Bhalai Singh, accused gave birth to two children, but they could not survive. On the date of the incident, the accused was weeping and was saying that she has no child, therefore, who will perform her last rites. Therefore, the case of the prosecution that accused was under frustration on account of not surviving her children is also established from the evidence of PW-5 Bhalai Singh.

18. For the foregoing reasons, we are of the considered opinion that the conviction recorded by the trial Court is based on proper appreciation of evidence of PW-2 Kamte and on sound reasoning. The evidence of PW-2 Kamte inspires full confidence of the Court. Therefore, we do not find any illegality or infirmity in the judgment of the trial Court.

19. In the result, the appeal being devoid of merit is liable to be dismissed and it is hereby dismissed.

Sd/-
L.C.BHADOO
Judge

Sd/-
SUNIL KUMAR SINHA
Judge
26-10-2007